I. Introduction

Mr. Chairman, my name is Martin H. Redish. I am the Louis and Harriet Ancel Professor of Law and Public Policy at Northwestern University, where I have taught for the past 25 years. I am the author of numerous articles on the subjects of free expression in general and constitutional protection for commercial speech and tobacco advertising in particular. I have advised numerous private organizations and companies, including members of the tobacco industry, on constitutional issues. I have also served as consultant to the Federal Trade Commission on the constitutionality of tobacco advertising regulation and have on a number of occasions testified before congressional committees on issues related to the First Amendment.

I appear before you today at the Committee's request, to convey my views on the constitutionality of the suppression or restriction of tobacco advertising. The issue, as I understand it, is whether or not the tobacco industry, by agreeing as part of the proposed settlement severely to restrict its advertising, is actually conveying something of value in exchange for its immunity from class action suit. If these regulations would ultimately be held constitutional in any event, then the companies' acceptance of such restrictions would not amount to meaningful consideration in exchange for the legislatively granted immunity. If, on the other hand, such regulations would be found to violate the First Amendment's

guarantee of free expression, then industry acceptance of such restrictions would, in fact, represent a waiver of a substantial legally protected interest on the industry's part.

My view is that, with only limited exception, governmental restriction of tobacco advertising violates fundamental precepts underlying the First Amendment guarantee of free speech, as well as established Supreme Court doctrine concerning the protection of commercial speech. Thus, by voluntarily agreeing to significant restrictions on its ability to advertise its lawful product, the tobacco industry is, in fact, accepting a significant diminution of its constitutionally guaranteed rights. To be sure, a private individual or entity has full power to contract away First Amendment rights. See, e.g., Snepp v. United States, 444 U.S. 507 (1980). In the case of the proposed tobacco settlement, I firmly believe that in agreeing to the proposed restrictions on advertising the industry is choosing to abandon what would otherwise be fully protected First Amendment rights.

I have divided my testimony into two basic sections. The first section seeks to place tobacco advertising regulation within the broad structure of the free speech protection. While this analysis focuses primarily on normative theoretical issues rather than on narrow doctrinal matters, an understanding of such issues is essential to a grasp of the doctrinal inquiry. The second section explores current Supreme Court commercial speech doctrine and applies it to the regulation of tobacco advertising. As I have already indicated, my ultimate conclusion is that under this doctrine, there can be no constitutionally acceptable justification for the suppression or widespread disruption of the

truthful advertising of a lawful product.

Much of the following discussion has been gleaned from two of my recent articles dealing with the constitutionality of tobacco advertising regulation: "Tobacco Advertising and the First Amendment," 81 Iowa Law Review 589 (1996), and "First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy," 24 Northern Kentucky Law Review 553 (1997).

II. Tobacco Advertising Regulation and the Structure of the Free Expression Guarantee

A. Tobacco Advertising Regulation as a Violation of Core First Amendment Precepts

No one could seriously dispute that today smoking gives rise to a social and political issue of enormous intensity and import. The smoking controversy involves a variety of heavily contested issues, implicating questions of scientific theory, individual free choice, social responsibility, and the scope of governmental power -- issues that constitute the very meat of the expression traditionally receiving full First Amendment protection.

In order to demonstrate the point, one need only inquire whether First Amendment protection would be extended to the commentary of anti-tobacco activists either asserting the scientific case for the link between smoking and illness or urging individuals not to smoke. The answer, quite obviously, is that such expression both would and should receive full First Amendment protection. Presumably, even the most ardent advocate of a narrow, politically-based First Amendment would be forced to concede that such expression lies at the core of free speech protection, because it implicates expression at the very center of the democratic process. The scientific, social and moral issues surrounding the smoking controversy, then, would have to be viewed as central to the values of free expression. But if this is true for the expression of those advocating that

individuals refrain from smoking, it logically must be equally true for speech advocating that people smoke. The label of "political speech" cannot rationally be attributed only to one side of a debate.

If there is one unbending principle of First Amendment theory and doctrine, it is that government may not shut off one side of a debate because of disagreement with the position sought to be expressed. To uphold such a restriction would allow government to skew the democratic process in order to achieve a preordained result. It would, moreover, reflect government's mistrust of its citizens' ability to make lawful choices on the basis of free and open inquiry, advocacy and discussion. Additionally, selective governmental suppression of speech on the basis of government's perception of the speech's wisdom or persuasiveness undermines the basic premise of governmental epistemological humility, without which the First Amendment cannot survive. Yet the consequence of -- indeed, the motivating force behind -- the regulation of tobacco advertising is that one side of this important public controversy is to be stifled so that only the expression of the other side can be heard. This result undoubtedly presents a grave threat to the continued viability of the free speech guarantee.

A reduced level of protection for tobacco advertising cannot be justified on the basis of the subject matter of the advertisements, because the expression urging individuals not to smoke, of course, deals with the exact same subject

matter as the speech of those arguing against smoking. Nor can it be justified on the grounds that the tobacco companies are promoting their own self-interest by means of their speech, because the existence of self-interest has never been thought to justify reduced protection for expression that is part of a public debate (nor could it, without significantly disrupting the system of free expression).

It could be argued that even were one to concede -- as one must -- that the smoking controversy implicates a matter of legitimate public debate, it does not logically follow that tobacco advertising constitutes a real contribution to the debate. The advertisements provide no concrete information, the argument would proceed. Rather, they convey nothing more than the frivolous and misleading idea that smoking is a pleasurable activity that increases the individual's personal attractiveness and social acceptability. Far from failing to contribute to a public debate, however, the advertisements constitute advocacy of one very clear choice in the smoking controversy. Especially once the required warnings are included, the advertisements can be read to urge individuals to risk the possibility of future health injury in order to obtain personal satisfaction and other largely intangible benefits, in much the same manner as individuals choose to engage in numerous other risk-producing activities.

Even were there not such an intense controversy over the ills of smoking, it would be difficult to distinguish the advocacy of smoking from debate concerning social and political issues traditionally subjected to full First

Amendment protection. Tobacco advertisements constitute advocacy concerning fundamental lifestyle choices available to the individual. When existence of the intense public controversy over smoking is added to the analysis, regulation of such advocacy takes on the ominous character of governmentally orchestrated suppression and mind control--the very type of regulation of expression that the First Amendment has been widely construed to preclude.

The fact that the government finds the arguments made in advocating a lawful activity to be unpersuasive or unwise, of course, makes such advocacy no less part of the public debate. There can be little question that tobacco advertising is today the subject of potential regulation for the very reason that it conveys an unpopular (albeit perfectly lawful) social message which challenges the views of those who presently hold political power. Far from being justified as merely regulations of the expression of "a seller hawking his wares," then, the restriction of tobacco advertising in reality represents the most dangerous form of thought manipulation.

Once it is recognized that the regulation of tobacco advertising constitutes governmental suppression of an unpopular social message, the arguments traditionally relied upon to reduce protection for commercial speech disintegrate. The facts that tobacco advertising may not provide a complete picture concerning the dangers of tobacco use, or that the tobacco industry's

promotions are motivated out of concern for profits, in no way distinguish the tobacco industry's message from the overwhelming majority of fully protected contributions to public debate. Thus, the argument that tobacco advertising misleadingly fails to provide a complete picture no more justifies reduced protection than it does in any other area of speech regulation. A welfare recipient speaking about her recent welfare cutbacks is no more likely in her speech to take note of the cutbacks' beneficial impact of the national deficit than the National Rifle Association is to devote attention in its literature to the number of accidental deaths caused by hand gun use. Moreover, in neither of these cases would one expect behavior that is any different. Virtually no contribution to public debate is free of personal motivation or bias. Nor do virtually any such contributions even purport to convey either a complete or objective portrayal of the issues.

The system seeks to deal with the negative consequences possibly flowing from these factors in a number of ways. Initially, recipients of such contributions to public debate will generally be expected to discount their arguments in light of the speaker's self-interest. Secondly, the concept of a free marketplace in ideas and information presumes that the arguments and facts unstated by one group of speakers will be provided by competing groups of speakers.

To be sure, reliance on the marketplace to assure that all aspects of an

issue are adequately explored in the course of public debate will prove unreliable in certain instances. But it is for this reason that government may itself choose to contribute to public debate, by warning the public of what it deems the erroneous or unwise positions already taken in the course of that debate. It does not follow, however, that government may skew the debate by means of outright suppression. Such a cure would most assuredly be considerably more harmful than the disease.

In any event, at least in the specific context of the smoking controversy, concern about the absence of counter-speech is, of course, moot. The fear of an expressive imbalance could hardly justify suppression of the tobacco industry's position, since no one could reasonably dispute the empirical reality of the widespread -- indeed, pervasive -- availability of the anti-smoking position.

B. Responding to the Case for Tobacco Advertising Regulation

The argument to justify a total ban on tobacco advertising proceeds as follows: Smoking is an addictive habit that causes severe social harm by giving rise to serious, often fatal illnesses in thousands of individuals every year. Government may exercise its regulatory police powers to prevent or reduce this harm. Government possesses the power to protect the public interest by completely banning sale of tobacco products, the argument proceeds, but

government need not take such extreme action. Rather, commentators have argued, government may take the lesser step of allowing sales to continue while prohibiting all promotional advertising of tobacco products. Because, the argument assumes, a reduction in advertising would reduce demand for the product, such a prohibition would largely achieve the government's legitimate goal of curbing tobacco use indirectly by reducing the public's demand for that product. In addition, it has been argued that the populace lacks the capacity to resist the seductive demands of tobacco advertising. Moreover, it has been asserted that government may impose wideranging restrictions on tobacco advertising in order to further its legitimate interest in protecting minors from smoking. Finally, some argue that regardless of its content, tobacco advertising is inherently misleading in suggesting or implying that use of such a harmful product can ever provide a positive or beneficial experience.

There are, then, four basic defenses of the constitutionality of the governmental restriction of tobacco advertising: (1) the "greater-includes-the-lesser" argument; (2) the "public ignorance" argument; (3) the "concern for minors" argument; and (4) the "inherently misleading advertising" argument. While each of these arguments possesses some superficial appeal, more careful examination reveals that all are seriously flawed in numerous respects.

1. The "Greater-Includes-the-Lesser" Rationale

By far the most logically seductive of the asserted constitutional rationales for a total ban on tobacco advertising is the argument that government's greater power to ban the actual sale of a product logically includes within it the lesser power to allow sales while simultaneously prohibiting promotional advertising.

While debate exists on the point, it is arguable that at one time the Supreme Court adopted this reasoning. Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U. S. 328 (1986). Certainly, viewed exclusively from the perspective of tobacco producers and sellers, a ban on advertising actually is a less restrictive measure than a complete ban on sales. But that is not the appropriate point of reference for purposes of First Amendment analysis. It is beyond dispute that the First Amendment provides greater constitutional protection to speech than the Fifth Amendment's Due Process Clause provides to the sale of a product. Thus, the "greater- includes-the-lesser" logic, when used in this context, actually stands the Constitution on its head, by reducing the level of constitutional protection afforded expression to that afforded commercial conduct.

The fallacy of the greater-includes-the-lesser rationale as a justification for speech suppression can be demonstrated by examining its conceivable application in the noncommercial speech context. Government clearly has the power to prohibit attempts at violent overthrow; indeed, it actually has prohibited

such conduct, by making it criminal. Yet the Supreme Court has nevertheless extended substantial First Amendment protection to the advocacy of violent overthrow. Under the greater-includes-the-lesser reasoning, of course, the government's "greater" power to suppress the conduct of violent overthrow would logically subsume within it the supposedly "lesser" power to suppress advocacy of that conduct. Thus, First Amendment doctrine has long been shaped on a rejection of the overly simplistic and misguided logic of the greater includes the lesser.

While one might seek to distinguish reliance on this precept in the realm of commercial speech regulation from its use in the noncommercial speech context, no reason exists to believe that the logic is somehow more compelling as a rationale for commercial speech regulation than for noncommercial speech regulation. Either one proceeds on the assumption that government's power to prohibit conduct subsumes within it the power to prohibit advocacy of that conduct, or one rejects such reasoning. The commercial nature of the expression in no way increases the force of this logic. Hence, attempts to rely on the greater-includes-the-lesser rationale are just as unacceptable as a justification for commercial speech regulation as when used to rationalize noncommercial speech regulation.

In its most recent statement on the commercial speech doctrine, 44 Liquormart v. Rhode Island, 116 S. Ct. 1495 (1996), the Court made clear its

rejection of the specious logic of the greater-includes-the lesser rationale. 116 S. Ct. at 1512. Continued reliance on it as a constitutional justification for the suppression of tobacco advertising is therefore neither theoretically nor doctrinally proper.

2. The "Public Ignorance" Rationale

An inherent assumption underlying the restriction of tobacco advertising is that the citizenry cannot be trusted to make proper judgments on the basis of exposure to truthful advocacy on behalf of a lawful activity. The premise of such restrictions is that individuals are incapable of making their own judgments on the basis of the expression of competing views and information. As is the case with the greater-includes-the-lesser rationale, there is no basis on which to believe that, if accepted, this logic is somehow uniquely tied to the suppression of commercial speech. Either individual citizens can be trusted to make legally valid life-affecting choices on the basis of an open marketplace of information and opinion, or they cannot. If they cannot, then government is logically as justified in censoring political expression which it deems to be advocating unwise or harmful positions as it is to censor tobacco advertising. Surely, acceptance of such reasoning in the context of political speech would be at odds with the fundamental premises of both the First Amendment and the notions of

democratic theory which underlie our system.

At least since the famed concurring opinion of Justice Brandeis in Whitney v. California, 274 U.S. 357, 377 (1927), it has been well accepted that the answer to supposedly harmful speech is not governmental suppression, but rather more speech. Under current free speech doctrine, government has at least limited power itself to contribute to the public debate. But government may not, consistent with the First Amendment, censor political communication on the basis of fears that the citizenry will be influenced to make unwise judgments. Yet, restrictions on the substance of tobacco advertising reflect just such governmental mistrust of individual decisionmaking ability. In this context the danger of "reverse dilution" is at its greatest: If the Supreme Court were to accept the premise that the public cannot be trusted to make choices on the basis of advocacy on behalf of a lawful activity, it is difficult to see how government could be denied the exact same power when political choices are involved. In 44 Liquormart, Justice Stevens, announcing the judgment of the Court, expressly rejected such paternalistic reasoning in the commercial speech context, as well. He refused to accept "the offensive assumption that the public will respond 'irrationally' to the truth." 116 S. Ct. at 1508. In so concluding, Justice Stevens was following a long line of commercial speech decisions rejecting use of such paternalism by government. See, e.g., Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 94 (1977); Virginia State Board of

Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 769-70 (1976). As the Court stated in Edenfield v. Fane, 507 U.S. 761, 767 (1993), "the general rule is that the speaker and the audience, not the government, assess the value of the information presented."

3. The "Concern for Minors" Rationale

Although the Food and Drug Administration (FDA) has characterized its sweeping restrictions on tobacco advertising as a means of protecting minors from exposure to such advertising, an argument premised on the supposed susceptibility of minors to tobacco advertising is no more compelling than the already discredited rationales as a justification for such broad and pervasive regulation. It is true both that minors do not have the same level of First Amendment rights as adults and that sale of tobacco to minors is an illegal activity. Thus, governmental restrictions aimed exclusively or predominantly at limiting exposure of minors to tobacco advertising may well constitute legitimate time-place-manner restrictions. Established First Amendment doctrine makes clear, however, that government may not reduce adults to the status of children, by regulating expression directed primarily at adults on the grounds that minors may also be exposed to it. See, e.g., Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 131 (1989) (holding unconstitutional a statute restating phone-sex services because the statute "has the invalid effect of limiting the

content of adult telephone conversations to that which is suitable for children to hear."); Butler v. Michigan, 352 U.S. 380, 383 (1957) (holding unconstitutional a statute making it an offense to make available to the general public materials found to have a potentially harmful influence on minors because the statute is "not reasonably restricted to the evil with which it is said to deal."). Just last term, the Supreme Court reaffirmed this position in Reno v. American Civil Liberties Union, 117 S. Ct. 2329, 2346 (1997), where it held unconstitutional a federal statute restricting the use of the Internet in an effort to protect minors from harmful materials. Quoting Sable, the Court reasoned that government may not "reduce[ ] the adult population…to…only what is fit for children." Id. See also Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 74-75 (1983) ("[R]egardless of the government's interest" in protecting children, "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.").

This analysis dictates the conclusion that restrictions on tobacco advertising within a certain distance of a school or playground are constitutional. The FDA's restrictions of tobacco advertising, however, sweep considerably more broadly than this. Such overboard restrictions, the Supreme Court has made clear, violate the First Amendment. More general restrictions on tobacco advertising cannot constitutionally be justified on the grounds that minors will also be exposed to it. To allow such restrictions would be to reduce all of

society to a community of children for purposes of the First Amendment.

4. The "Inherently Misleading" Rationale

Scholars have on occasion argued that tobacco advertising is inherently deceptive, because no cigarette advertising gives adequate warning of the wide range of serious and life threatening diseases induced by the ordinary use of the product. Quite to the contrary, the effect of this advertising is to conceal or to minimize these facts. Smoking is portrayed as not harmful, by associating it with traditionally young, healthy, athletic, and virile activities, the argument proceeds.

This rationale for the suppression of tobacco advertising is truly puzzling, in light of the fact that, unlike advertising for virtually any other lawful product, tobacco advertising must place a variety of explicit warnings concerning the dangers of smoking. When they join these warnings with the promotional material contained in the advertisements, tobacco advertisers are effectively saying to the potential consumer: "The government believes that engaging in this activity presents serious health risks, but you should choose to live for the enjoyment and pleasures of the moment, and use of our product will provide you with immediate pleasure and satisfaction." It is difficult to describe this argument as inherently deceptive. There are numerous activities that give

rise to significant risk of physical harm. Yet individuals are allowed to assume those risks -- risks that may be considerably more acute than those presented by smoking -- if they conclude that the counter-balancing pleasures to which the activity gives rise outweigh those dangers.

The fact that an activity is portrayed in advertising as pleasurable does not necessarily imply that the activity is also healthful. For example, to characterize eating ice cream as pleasurable to many would most surely be an accurate portrayal, even though engaging in that activity may well increase one's risk of high cholesterol and possible heart attack. As long as tobacco advertisements simultaneously include health warnings, then, the argument that such advertisements are inherently deceptive is itself false and misleading.

III. The Constitutionality of Tobacco Advertising Regulation Under the Commercial Speech Doctrine

A. 44 Liquormart and the Strengthening of Commercial Speech Protection

Even if one were to view governmental restriction of tobacco advertising not--as I have argued--as the suppression of one side of a social and political debate but rather solely as a form of commercial speech regulation, there can be little doubt today that anything other than the narrowest restriction designed to

protect minors is unconstitutional. Although the Supreme Court first extended substantial First Amendment protection to commercial speech in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), in the early years of such protection the Court afforded "commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." Id. at 763. As a result, the Court on occasion upheld speech regulations that would quite probably have been deemed unconstitutional in the regulation of noncommercial expression.

In Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980), the Court established a four-part test to determine the constitutionality of commercial speech regulation: (1) was the speech false or misleading (if so, it could constitutionally be regulated); (2) does the government regulation further a substantial interest; (3) does the regulation directly advance that interest; and (4) could the governmental interest be equally served by a more limited restriction on commercial speech.

In its recent decision in 44 Liquormart v. Rhode Island, 116 S. Ct. 1495 (1996), the Supreme Court significantly strengthened the First Amendment's protection of commercial speech. At least four members of the Court expressed the view that such protection should actually be deemed to far exceed the level of protection given by the Central Hudson test, and the other members of the Court clearly endorsed a strengthened version of that test.

In 44 Liquormart the Court held unconstitutional Rhode Island statutes prohibiting the advertising of liquor prices other than at the location of sale. Four separate opinions were written. Justice Stevens, announcing the judgment of the Court, spoke for three justices when he wrote:

> Advertising has been a part of our culture throughout our history. Even in colonial days, the public relied on "commercial speech" for vital information about the market . . . . Indeed, commercial messages played such a central role in public life prior to the Founding that Benjamin Franklin authored his early defense of a free press in support of his decision to print, of all things, an advertisement for voyages to Barbados. 116 S. Ct. at 1504.

Justice Thomas, in a separate concurring opinion, expressed the view that "[i]n cases . . . in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test adopted in Central Hudson . . . should not be applied . . . . Rather, such an 'interest' is per se illegitimate and can no more justify regulation of 'commercial' speech than it can justify regulation of 'noncommercial' speech." 116 S. Ct. at 1516. In reaching this conclusion, he emphasized "the importance of free dissemination of information about commercial choices in a market economy; the antipaternalistic premises of the First Amendment; the impropriety of manipulating consumer choices or public opinion through the suppression of accurate 'commercial' information; the near impossibility of severing 'commercial' speech from speech necessary to democratic decisionmaking; and the dangers of permitting the government to do

correctly what it might not have been able to muster the political support to do openly." 116 S. Ct. at 1517.

Thus, at least four members of the Court in 44 Liquormart adopted the view that under most circumstances, commercial speech is to be treated fungibly with traditionally protected categories of expression in terms of the standard of review. Even Justice O'Connor, who -- speaking for four justices -- refused to accept Justice Stevens' equation of commercial and non-commercial speech, appeared to apply a highly speech-protective version of the Central Hudson test. 116 S. Ct. at 1520.

The decision in 44 Liquormart thus represents a dramatic breakthrough in commercial speech theory. Though they differed as to their reasoning, all members of the Court adopted a considerably more protective approach to commercial speech than previous decisions generally had empoyed.

B. Tobacco Advertising Regulation Under the Revitalized Central Hudson Test

After the decision in 44 Liqourmart, it is extremely difficult to believe that the Supreme Court would ever uphold a total--or even a substantial--restriction of the truthful advertising of any lawful product, regardless of how unwise government might deem a consumer's choice to use that product. As the

opinions of both Justices Stevens and Thomas illustrate, such paternalism is wholly inconsistent with the traditions and normative principles of the First Amendment. Moreover, the asserted interest in protecting minors--while itself a legitimate basis for restricting expression--cannot be relied upon to justify sweeping regulation of communications seen by adults, as demonstrated by the long line of Supreme Court decisions already noted. While it is true that those justices did not speak for a majority of the Court, given the speech protective version of preexisting doctrinal standards adopted by Justice O=Connor, it is highly unlikely that such a regulation could be justified even under those preexisting standards.

Even if government were recognized to have the constitutional power to influence consumer behavior by means of the suppression of commercial advertising, the constitutionality of severe restrictions on tobacco advertising does not necessarily follow. The Central Hudson test imposes three necessary conditions in order to establish the constitutionality of governmental regulation of truthful, nonmisleading advertising for a lawful product: The government's interest must be "substantial," the regulation must directly advance that interest, and the regulation must be no more extensive than necessary. If a reviewing court were to reject the revised approach to the substantiality of the government's interest suggested here, in order to uphold such a ban on tobacco advertising that court would still have to find both that the interest in protecting

public health is directly advanced by the ban and that the ban and the attainment of that interest constitute a reasonable fit. Real questions can be raised about the viability of a tobacco advertising ban under both of these Central Hudson elements.

a. The "Directly Advances" Requirement

Under the "directly advances" element of the Central Hudson test, the Court will carefully review the validity of the government's assertion of a connection between the suppression of commercial speech and attainment of the government's valid goal. As the Court noted in Edenfield v. Fane, 507 U.S. 761, 776 (1993), the government has "the obligation to demonstrate that it is regulating speech in order to address what is in fact a serious problem and that the preventative measure it proposes will contribute in a material way to solving that problem." Even the content-neutral restriction of commercial speech, said the Court, "still must serve a substantial state interest in a direct and effective way."

Thus, in order to sustain a ban on tobacco advertising, the government must do more than conclusorily assert a connection between advertising and consumption--indeed, probably more than even establish a generic connection between advertising and consumption. The government would have the burden to establish the existence of such a connection in the unique context of the

tobacco industry, or at least in an industry heavily immersed in brand competition. The tobacco industry, however, has vigorously argued that its advertising is designed not to produce a generic increase in the use of tobacco products but rather to improve one brand's position vis-a-vis its competitors. Though the purposes and effect of advertising are issues well beyond the bounds of any expertise I may possess, it does not seem unreasonable to believe that this would likely be true in most industries with heavy brand competition.

The nature and extent of the proof burden will quite probably have a significant impact on determining the victor on the "directly advances" issue. After the highly speech-protective decision in 44 Liquormart, at the very least government would have to bear a significant evidentiary burden on this factual issue. More important, however, is that in the post-44 Liquormart world of commercial speech protection there would likely be no need to engage in this factual inquiry. At least when the advertising is directed primarily to adults, government may not employ the suppression of truthful advertising as a paternalistic means of manipulating consumer choices. While governmental power to control the choices of minors may be greater than its power to control the choices of adults, reliance on this interest cannot justify anything more than the imposition of highly limited time-place-manner restrictions on tobacco advertising.

Thus, if, for example, an advertising campaign were to include the

purchase of advertising time at movie theaters showing children's films or the heavy use of billboards near schools, or if the advertising employed cartoon characters which were of obvious special interest to children--for example, the use of Mickey Mouse, Bugs Bunny, Bozo, or Barney--government might appropriately ban the advertising. But for the most part the advertising sought to be regulated by both the FDA and the proposed legislation defies such description.

Instead, by relying on the justification of the protection of minors as the basis for effectively doing away with virtually all tobacco advertising, the FDA seeks to have a very small tail wag an extremely large dog. This the First Amendment does not permit it to do. Absent some demonstration that the timing and placing of a campaign has been especially structured in order to reach minors, or will reach only or predominantly minors, the special First Amendment rules involving minors must be deemed inapplicable.

In any event, even if one were to ignore the last forty years of the Supreme Court's First Amendment jurisprudence and justify the constitutionality of a wideranging ban of tobacco advertising on the basis of the government's concern for minors, the requirements of Central Hudson would still have to be met to show that the restrictions actually further the governmental interest in protecting minors. It is by no means clear that this could be done. While the government's interest in deterring smoking by minors is clearly a "substantial" one, it is not nearly as clear that the overwhelming majority of the regulations adopted by the FDA meets the final two elements of the Central Hudson test. In order to satisfy these elements, the government would have to establish both

that the prohibition "directly advances" the interest in deterring smoking by minors and that there exists a reasonable fit between the means chosen and the desired end. To meet the former requirement, the government would presumably need to demonstrate that a significant contributing reason for teen smoking is the use of cartoon characters or the use of color or human figures. The connection between a particular method of advertising and increased consumption among particular groups cannot reasonably be assumed. Thus, to meet its substantial burden of proof under Central Hudson, the government would likely have to provide supporting behavioral studies that establish such a link. To date, most evidence that exists fails to establish the link between advertising and smoking by minors. See, e.g., John Harrington, "Up In Smoke: The FTC's Refusal to Apply the 'Unfairness Doctrine' to Camel Cigarette Advertising," 47 Fed. Comm. J.J. 593, 608 (1995) (an advocate of restriction on use of cartoon characters concedes that the "directly advances" requirement "would appear to pose some difficulty for a ban on Joe Camel advertising, since studies have yet to establish any direct causal link between advertising and an increase in cigarette consumption, nor has Joe Camel been conclusively shown to have the effect of causing children to smoke.").

Although it is impossible at this point to predict how this fact-intensive inquiry would ultimately be resolved, it is important to keep in mind one overriding point: As recent Supreme Court decisions have made clear, the

inquiries under the final two elements of the Central Hudson test present hurdles to government regulation that are by no means pro forma. To the contrary, the factual burden of proof imposed on the government before it may regulate commercial speech is indeed a demanding one.

b. The "Reasonable Fit" Requirement

In expounding on its final requirement, the Central Hudson Court stated: "The regulatory technique may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted state interest, . . . nor can it completely suppress information when narrower restrictions on expression would serve its interest as well." 447 U.S. at 565. Although the Court has insisted that the final Central Hudson prong does not impose the equivalent of a "least-restrictive-means" requirement, [Board of Trustees v. Fox, 492 U.S. 469, 476-77 (1989)] subsequent decisions actually seem to approach such a probing level of judicial review. See Rubin v. Coors Brewing Co., 514 U.S. 476 (1995); City of Cincinnati v. Discovery Network, 507 U.S. 410 (1993).

In the case of a constitutional challenge to tobacco advertising restrictions, the most obvious question under Central Hudson's fourth prong would be whether the government's interest could be adequately furthered by either the required inclusion of warnings (as is already currently required by

federal law) or the funding of counter-speech. In 44 Liquormart, Justice Stevens expressly stated that the availability of such methods does, in fact, constitute a less invasive alternative to the suppression of commercial speech and therefore must be employed.

One alternative to a total ban that is arguably less invasive of free speech interests is what have been referred to as "tombstone" limitations. Indeed, it is this methodology which the FDA has chosen to employ. Under such regulations, tobacco companies are permitted to advertise, but only pursuant to strict limitations imposed by the government, usually including at the very least a ban on the use of color, human figures, or cartoons.

One form of tombstone restrictions allows tobacco advertising to include only brand name, price, and tar and nicotine levels. Neither promotional text, colors, nor photographs are permitted. Another less restrictive form (employed by the FDA) imposes a "text-only" requirement, allowing promotional argument but prohibiting the use of color or imagery. Tombstone limitations may be thought to be less problematic, from a free speech perspective, than a total ban, for the obvious reason that they at least permit some basic communication concerning the product. This fact, however, should not be allowed to obscure the significant interference with the free speech right to which tombstone limitations give rise.

Tombstone limitations create two distinct and serious First Amendment

problems: (1) they disrupt a speaker's choice of method of expression, and (2) they selectively interfere with the expression of particular viewpoints. As to the first point, the Supreme Court has long recognized the important free speech value inherent in a speaker's choice of manner of expression. Surely, penalizing the defendant for wearing an obscenity describing the draft on his jacket in Cohen v. California, 403 U.S. 15 (1971), does not completely prevent him from expressing his displeasure with the draft, yet the Supreme Court nevertheless found the defendant's choice to use the obscenity to be constitutionally protected. Similarly, the Court in Texas v. Johnson, 491 U.S. 397 (1989), recognized the First Amendment right of an individual to burn the American flag, even though a prohibition on such activity does not prevent that individual from making his substantive point in other ways. The Court has reached these conclusions because, as Justice Harlan's opinion in Cohen reasoned:

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. 403 U.S at 26.

Compounding the problem is that--unlike the restriction invalidated in Cohen--tombstone limitations restrict a speaker's chosen method of expression on a blatantly viewpoint-based ground. Unlike those advocating smoking, opponents of smoking are in no way restricted in their method of advocacy. Moreover, restrictions on the speaker's ability to choose the method of

expression derive from the same unacceptable paternalistic concerns that underlie a total ban: the fear that the public will be induced, on the basis of persuasive appeals, to engage in a lawful activity because the government does not trust the public's ability to make judgments on the basis of those appeals.

Finally, unlike the "manner" limitations invalidated in Cohen and Johnson, tombstone limitations regulate considerably more than the chosen manner of expression. Rather, they effectively prevent tobacco advertisers from conveying a substantive message. Advertisers are prohibited from advocating the activity of smoking in the most effective manner. Therefore, tombstone limitations should be deemed to be as harmful to free speech values as are any viewpoint-based regulations.

In a certain sense, tombstone limitations may actually be even more pernicious than a total ban on tobacco advertising. This is because they give the illusion of allowing communication while in reality significantly interfering with the message conveyed by that communication. They therefore may not be subjected to the same legislative reluctance as a total ban would. For all of these reasons, tombstone limitations should not be considered a constitutionally acceptable alternative to a total ban.

IV. Conclusion

Despite the FDA's efforts to "dress up" its restrictions on tobacco

advertising as nothing more than benign time-place-manner regulations designed to further the government's legitimate interest in protecting minors, careful analysis of the agency's regulations demonstrates that they sweep considerably further than this limited interest would permit. The FDA has employed a hatchet, where the First Amendment demands use of a scalpel. The FDA's regulations, then, should be revealed for what they effectively are: content-based efforts to stifle one side of a public debate because of a paternalistic governmental fear that the citizenry cannot be trusted to judge the truthful advocacy of lawful conduct. It is difficult to imagine a more stark and ominous governmental interference with the right of free expression.

The tobacco industry has a clear constitutional right to advertise its product to the adult population. The FDA's regulations significantly interfere with the exercise of that right, and are therefore unquestionably unconstitutional. Moreover, such restrictions would possess no higher level of constitutional validity if included in the form of congressional legislation, rather than agency regulations. The industry's willingness to abandon its First Amendment right thus constitutes the voluntary acceptance of a significant waiver of the free speech guarantee.

Iowa Law Review Footnotes:

FN1. R.A.V. v. City of St. Paul, 508 U.S. 377 (1992).

FN2. See, e.g., Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per

curiam).

FN3. See, e.g., Vincent Blasi & Henry P. Monaghan, The First Amendment and Cigarette Advertising, 256 JAMA 502 (1986)(arguing in favor of constitutionality of tobacco advertising ban).

FN4. For purposes of the constitutional analysis that follows, I proceed on the assumption that, as a scientific matter, the linkage between smoking and illness does in fact exist. On the issue of First Amendment protection for efforts by tobacco companies to challenge the validity of these conclusions, see Martin H. Redish, Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech, 43 Vand. L. Rev. 1433 (1990).

FN5. See Section III, infra.

FN6. See Sections III.A(2)(b); IV.B, infra.

FN7. See Section V, infra.

FN8. See Section IV.B, infra.

FN9. See 15 U.S.C. S 1335 (1988): "(I)t shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission."

FN10. See Section IV.A, infra.

FN11. See, e.g., Ohralik v. Ohio St. Bar Ass'n, 436 U.S. 447, 456 (1978) (affording "commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.").

FN12. See, e.g., Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995); Linmark Ass'n, Inc. v. Willingboro, 431 U.S. 85 (1977)(holding regulations of commercial speech to be unconstitutional).

FN13. See Sections III-V, infra.

FN14. See Section II, infra.

FN15. See, e.g., Ohralik, 436 U.S. at 456 (stating that to "require a parity of constitutional protection for commercial and noncommercial speech

alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech"); see also Edward L. Barrett, Jr., "The Unchartered Area" - Commercial Speech and the First Amendment, 13 U.C. Davis L. Rev. 175, 208-09 (1980).

FN16. See Redish, supra note 4, at 1456-58.

FN17. While it has been suggested that tobacco advertising should be considered inherently misleading, such a conclusion is baseless. See Section III A.(3), infra.

FN18. See Section II, infra.

FN19. See Section III.B (2)(b), infra.

FN20. See, e.g., Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995); City of Cincinnati v. Discovery Network, 507 U.S. 410 (1993); Section III.B (2)(b), infra.

FN21. See Section II, infra.

FN22. See Section III, infra.

FN23. See Section III.A (2), infra.

FN24. See Section IV, infra.

FN25. See Section V, infra.

FN26. For a discussion of the commercial speech doctrine's historical development, see Martin H. Redish, The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression, 39 Geo. Wash. L. Rev. 429 (1971); Ronald D. Rotunda, The Commercial Speech Doctrine in the Supreme Court, 1976 U. Ill. L. F. 1080.

FN27. See, e.g., Breard v. City of Alexandria, 341 U.S. 622 (1951); Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

FN28. See, e.g., Thomas I. Emerson, Toward a General Theory of the First Amendment 105 n.46 (1966) (arguing, in a conclusory manner, that "(c)ommunications in connection with commercial transactions generally relate to a separate sector of social activity involving the system of

property rights rather than free expression"); Thomas H. Jackson & John C. Jeffries, Jr., Commercial Speech: Economic Due Process and the First Amendment, 65 Va. L. Rev. 1, 14 (1979) (asserting that "(w)hatever else it may mean, the concept of a first amendment right of personal autonomy in matters of belief and expression stops short of a seller hawking his wares"); Frederick Schauer, Commercial Speech and the Architecture of the First Amendment, 56 U. Cin. L. Rev. 1181, 1187 (1988) ("presuppos(ing) that commercial speech . . . is not a central theoretical concern of the first amendment"). Cf. Alex Kozinski & Stuart Banner, Who's Afraid of Commercial Speech?, 76 Va. L. Rev. 627, 628 (1990) (footnote omitted): "(P)rofessors take (the distinction between commercial and noncommercial speech) as a given and then devote their energies and research grants to discerning a principle to justify it, rather than proceeding the other way around."

FN29. 425 U.S. 748 (1976).

FN30. Id. at 765 ("Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price.").

FN31. In Virginia Board, the Court noted that "(i)n concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiated from other forms. There are commonsense differences between speech that does .no more than propose a commercial transaction' and other varieties." Id. at 771 n.24. See also Ohralik v. Ohio St. Bar Ass'n, 436 U.S. 447, 456 (1978)(affording to "commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values").

FN32. 425 U.S. at 763.

FN33. 507 U.S. 410, 437 (1993) (Blackmun, J., concurring).

FN34. Id. In Cohen v. California, 403 U.S. 15 (1971), the Court extended First Amendment protection to the wearing of an obscenity to describe the draft on a jacket.

FN35. 466 U.S. 485 (1984). The Court in Bose applied the "actual malice" test of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), to a trade

libel claim brought because of an article in Consumer Reports.

FN36. For elaboration of this argument, see Redish, supra note 4, at 1444- 55.

FN37. Discovery Network, 507 U.S. at 418-19.

FN38. Id. at 424.

FN39. Id.

FN40. Id.

FN41. See Section III.B(2), infra.

FN42. Discovery Network, 507 U.S. at 428: In the absence of some basis for distinguishing between "newspapers" and "commercial handbills" that is relevant to an interest asserted by the city, we are unwilling to recognize Cincinnati's bare assertion that the "low value" of commercial speech is a sufficient justification for its selective and categorical ban on newsracks dispensing "commercial handbills."

FN43. Despite the clear implications of the Court's opinion in Discovery Network, lower courts appear to be confused about the extent of the holding. In Moser v. FCC, 826 F. Supp. 360 (D. Or. 1993), rev'd, 46 F.3d 970 (9th Cir. 1994), the court properly followed the Discovery Network analysis in holding unconstitutional a portion of the Telephone Consumer Protection Act, which amended the Communications Act of 1934 by restricting telephone solicitation techniques. The Act made it unlawful for any person "to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the (Federal Communications) Commission. . . . " 47 U.S.C. S 227(b)(1)(B) (1992). The Act authorized the FCC to exempt "calls that are not made for a commercial purpose. . . . " Id. The FCC issued regulations exempting such noncommercial calls. After describing the Discovery Network reasoning, the court stated: "The same is true here. The government has failed its burden of establishing a reasonable fit between the ends sought, and the burden the legislative means places upon speech." 826 F.Supp. at 365. It noted that "(b)oth kinds of telemarketing calls trigger the same ring of the telephone; both kinds of calls invade the home equally, and

both risk interrupting the recipient's privacy equally." Id. at 366.

The Ninth Circuit reversed, in a truly puzzling opinion. 46 F.3d 970 (9th Cir. 1994). Initially, the Court of Appeals noted that the court's jurisdiction extended only to a challenge to the statute, not to the FCC's regulations. It then noted that the commercial-noncommercial distinction had actually been imposed in regulations issued by the Commission, not by the statute itself. Ignoring the fact that the statute on its face authorized the very creation of that dichotomy, the court proceeded to characterize the Act as content- neutral. Id. at 974. This conclusion was sufficiently bizarre in itself, in light of the indisputable fact that but for the statute's express authorization for the exemption of non-commercial calls the dichotomy could not have come into existence. The court then compounded its confusion, however, by testing (and upholding) the statute's restrictions under the standards reserved for regulations of commercial speech. Id. But if the statute's prohibitions are deemed to be content-neutral and therefore not to recognize a commercial- noncommercial distinction, one may reasonably ask why the Act is tested exclusively under commercial speech standards. The Ninth Circuit correctly pointed out that, under the governing commercial speech test, "Congress could regulate a portion of these calls without banning all of them." Id. Once again, though, one may wonder why the court could consider the point to be relevant, in light of its

conclusion that the statute drew no distinction among types of telemarketing calls. In applying this principle to a commercial-noncommercial distinction, however, the Court of Appeals (inexplicably) ignored the exception to that broader principle fashioned by the Supreme Court in Discovery Network for distinctions drawn between commercial and noncommercial speech regulations, even though the District Court decision that it reversed had expressly relied on that decision. Consideration of this decision demonstrates that the Court of Appeals' holding directly conflicts with both the holding and reasoning in Discovery Network. See also Ass'n of Nat'l Advertisers, Inc. v. Lungren, 44 F.3d 726, 731 (9th Cir. 1994); Destination Ventures, Ltd. v. FCC, 844 F.Supp. 632 (D. Or. 1994).

FN44. See, e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562 (1980). See Section III.B(2), infra.

FN45. For a detailed analysis of this argument, see Martin H. Redish, Freedom of Expression: A Critical Analysis 60-68 (1984).

FN46. One such factor, the Supreme Court has said, is the difference between commercial and noncommercial speech for purposes of the

regulation of false expression. In Virginia Board the Court pointed to two reasons why false or misleading commercial speech is more appropriately subject to regulation than equally misleading political expression: (1) that "(t)he truth of commercial speech . . . may be more easily verifiable by its dissiminator than . . . news reporting or political commentary," and (2) that "(s)ince advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation." 425 U.S. at 771 n.24. For a critique of this reasoning, see Redish, supra note 45, at 63-66.

FN47. See Section III.A(2), infra.

FN48. But see note 43, supra.

FN49. Blasi & Monaghan, supra note 3, at 503 (emphasis added).

FN50. Id. at 506. See Section III.A(2) infra.

FN51. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993). See Section II, supra.

FN52. U.S. Const. amend. V, cl. 4.

FN53. See Redish, supra note 4, at 1440-42. See also Burt Neuborne, A Rationale for Protecting and Regulating Commercial Speech, 46 Brook. L. Rev. 437, 450 (1980) ("Merely because the topic of a given speech is potentially subject to broad majoritarian regulation is no basis for suggesting that speech about a lawful activity is stripped of non-majoritarian protection.").

FN54. See Brandenberg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (stating that the First Amendment protects advocacy of unlawful conduct "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

FN55. See note 38, supra, and accompanying text. In 44 Liquormart, Inc. v. Rhode Island, 1996 WL 241709 (U.S. May 13, 1996) (decided as this Article went to press), Justice Stevens, in the opinion announcing the judgment of the Court, wrote: "(T)he 'greater-includes-the-lesser' argument should be rejected for the . . . reason that it is inconsistent with both logic and well- settled doctrine."

FN56. By its terms, the First Amendment right of free expression is

unlimited in its reach, while the Fifth Amendment protects other forms of liberty from deprivation only "without due process of law."

FN57. See generally John M. Blim, Undoing Our Selves: The Error of Sacrificing Speech in the Quest for Equality, 56 Ohio St. L.J. 427 (1995).

FN58. See generally Martin H. Redish, Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory, 11 Crim. Just. Ethics 29 (Summer/Fall 1992).

FN59. See Matthew L. Miller, Note, The First Amendment and Legislative Bans of Liquor and Cigarette Advertisements, 85 Colum. L. Rev. 632, 643 (1985) (describing dangers of "regulation by stealth".).

FN60. Health Protection Act of 1987: Hearing on H.R. 1272 and H.R. 1532 Before the Subcomm. on Transportation, Tourism and Hazardous Materials of the Comm. on Energy and Commerce of the House of Representatives, 100th Cong., 1st Sess. 80- 6 (1990) (statement of Burt Neuborne, on behalf of the Association of National Advertisers).

FN61. Id.

FN62. It might be suggested that even these government's indirect regulatory actions are subjected to the political process, because such measures obviously must be enacted through normal lawmaking procedures. However, in light of the well established and widespread existence of voter alienation, see, e.g., Peter Bachrach, The Theory of Democratic Elitism: A Critique (1967), intense citizen interest would not likely be triggered by indirect measures, such as advertising bans.

FN63. Blasi & Monaghan, supra note 3, at 505 n.1.

FN64. Id.

FN65. See Alexander Meiklejohn, Political Freedom 27 (1960) (arguing that "(t)he principle of the freedom of speech springs from the necessities of the program of self-government. . . . It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.").

FN66. See Blim, supra note 57, at 453: Without the capacity for speech, humans would relate to their world and to each other as mere organisms

in an environment. Speech is special, different from human conduct of other sorts, because it imbues not only all conduct but also the world of the languaged creature with meaning. The contention that experiences apart from communication contribute to self-realization in the same way as does speech misses the essential point. The self-realization value to be derived from nonspeech experience depends upon the speech capacity, for without that capacity, activities and experiences such as travel and work would mean no more to us than they do to animals.

FN67. 478 U.S. 328 (1986).

FN68. Id. at 345-46.

FN69. John M. Blim, Comment, Free Speech and Health Claims Under the Nutrition Labeling and Education Act of 1990: Applying a Rehabilitated Central Hudson Test for Commercial Speech, 88 Nw. U. L. Rev. 733, 754 (1994). The same commentator suggests that "interpretations that see Posadas as materially reducing the constitutional protection afforded commercial speech. . . tend to misread or exaggerate the case's result." Id. at 752.

FN70. Id. at 754. The commentator's description of the specific context in which Justice Rehnquist made the statement in question is accurate. See 478 U.S. at 345-46.

FN71. 447 U.S. 557 (1980).

FN72. The current standard of constitutional protection for commercial conduct is the highly deferential "reasonableness" standard. See, e.g., Ferguson v. Skrupa, 372 U.S. 726 (1963).

FN73. 113 S. Ct. 2696 (1993).

FN74. See Section III.B(1)(b), infra.

FN75. 113 S. Ct. at 2703.

FN76. Id.

FN77. See note 49, supra, and accompanying text.

FN78. Commentators have suggested that tobacco advertising is in fact not truthful, but rather inherently misleading. See Blasi & Monaghan,

supra note 3, at 506. For a number of reasons, however, this view is misguided. See Section III.A(3), infra.

FN79. Indeed, the Court expressly rejected such paternalism in the commercial speech context in Virginia Board. See also Peel v. Attorney Registration & Disciplinary Comm'n of Ill., 496 U.S. 91, 105 (1990) (plurality opinion) ("We reject the paternalistic assumption that the recipients of petitioner's letterhead are no more discriminating than the audience for children's television."). See Section III.B(1)(a), infra.

FN80. See Section II, supra.

FN81. See, e.g., Blasi & Monaghan, supra note 3. See Section III.A, supra.

FN82. 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

FN83. See generally Mark G. Yudoff, When Government Speaks (1983);

Martin H. Redish & Daryl I. Kessler, Government Subsidies and Free Expression, 80 Minn. L.Rev. 543 (1996).

FN84. See note 16, supra, and accompanying text.

FN85. See generally Vincent Blasi, The Pathological Perspective and the First Amendment, 85 Colum. L. Rev. 449 (1985).

FN86. See, e.g., Cass R. Sunstein, After the Rights Revolution: Reconceiving the Regulatory State 69 (1990):

Many statutes result from efforts by self-interested private groups to redistribute wealth in their favor. Purportedly public-spirited regulation in fact helps narrow or parochial interests. . . . Considerable work in the public choice tradition has explored structural characteristics of the legislative process that aggravate this effect. Collective action problems and opportunities for strategic behavior are principal culprits here.

See also William N. Eskridge, Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation, 74 Va. L. Rev. 275, 277 (1988) ("Public choice theory indicates that the legislature will produce too few laws that serve truly public ends, and too many laws that serve private ends."); Jonathan R. Macey, Promoting Public Regarding

Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum. L. Rev. 223, 223 (1986) ("Too often the (legislative) process seems to serve only the purely private interests of special interest groups at the expense of the broader public interests it was ostensibly designed to serve.").

FN87. See generally Martin H. Redish, The Role of Pathology in First Amendment Theory: A Skeptical Examination, 38 Case W. Res. L. Rev. 618 (1988).

FN88. See generally Martin H. Redish, The Content Distinction in First Amendment Analysis, 34 Stan. L. Rev. 113 (1981).

FN89. President Clinton recently issued proposed "Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products To Protect Children and Adolescents," SS 897.30-897.34, 60 Fed. Reg. 41,314 (1995), which seek to restrict tobacco advertising on the grounds that minors are exposed to it. The regulations would require that advertising in any publication with a youth readership of more than 15% or more than 2 million children and adolescents under 18 be limited to a text-only format in black and white.

Also, the regulations would prohibit the sale and distribution of non-tobacco items and services that are identified with a cigarette or smokeless tobacco product brand name or other identifying characteristics. Additionally, they would prohibit sponsorship of certain events that are identified with such brand name products. Finally, they would prohibit outdoor advertising of tobacco products from appearing outside of buildings within 1000 feet of an elementary or secondary school or playground.

Restrictions on the display of tobacco advertising near schools or playgrounds do not give rise to serious First Amendment problems, because they constitute appropriate time- place-manner restrictions designed to protect the government's substantial interest in protecting minors. Restrictions on the sale of products containing tobacco logos, however, could not be justified on such a ground, because they extend well beyond the government's limited interest in protecting minors. See note 90, infra, and accompanying text. The same could be said of the proposed restrictions on advertising in publications with 15% youth readership (if, indeed, there were any viable means of making such a calculation in the first place). See note 90, infra, and accompanying text. Less certain is the constitutionality of the restriction on sponsorship of events . While such events are not limited to minors in their exposure, the

level of free speech interest in such sponsorships is questionable, at best. Ironically, however, it is the very justification asserted to support such a prohibition that raises serious First Amendment problems. The President's concern is that "(s)ponsorship by . . . tobacco companies associates tobacco use with exciting, glamorous, or fun events. . . . " 60 Fed. Reg. at 41,336. Thus, government is regulating sponsorships for an impermissible speech- related reason. Cf. United States v. O'Brien, 391 U.S. 367 (1968) (subjecting regulations of expressive elements of speech and conduct to compelling interest standard).

FN90. See, e.g., Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 131 (1989) (holding unconstitutional a statute restricting phone-sex services because the statute "has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear. It is another case of .(burn)ing the house to roast the pig.' "); Butler v. Michigan, 352 U.S. 380, 383 (1957) (holding unconstitutional a statute making it an offense to make available to the general public materials found to have a potentially harmful influence on minors because the statute is "not reasonably restricted to the evil with which it is said to deal.").

FN91. Blasi & Monaghan, supra note 3, at 506. See also Tobacco Issues:

> Hearings on H.R. 1250 Before the Subcomm. on Transportation, Tourism and Hazardous Materials of the Comm. on Energy and Commerce of the House of Representatives, 101st Cong., 1st Sess. 74-83, 75 (1990) (Statement of Mark Silbergeld, on behalf of Consumer's Union) ("The problem with the advertising and promotional practices . . . is that in our view, it is inherently deceptive because the industry cannot tell the truth about the product and still sell tobacco products. . .").

FN92. 15 U.S.C. S 1333.

FN93. See Section III.B, supra.

FN94. See Section III.A (3), supra.

FN95. See Section III.B (2), infra.

FN96. See Section III.B(1)(b), infra.

FN97. See Section III.B(2), infra.

FN98. See Section II, supra.

FN99. See Section III.A(2), supra.

FN100. See Section III.B(1)(a), infra.

FN101. 425 U.S. 748 (1976).

FN102. Id. at 769-70.

FN103. Id. at 770. Cf. Comment, First Amendment Values and the Constitutional Protection of Tobacco Advertising, 82 Nw. U. L. Rev. 145, 146 (1987) (footnote omitted) ("(T)he Virginia Pharmacy opinion . . . rested fundamentally on the value of audience access to information guiding private economic choices, a constituent of the broader democratic value of self- rule.").

FN104. 431 U.S. 85 (1977).

FN105. Id. at 94.

FN106. Id. at 95.

FN107. Id. at 93 (footnote omitted).

FN108. Id. at 94.

FN109. 431 U.S. at 96-97.

FN110. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), cited in 431 U.S. at 97.

FN111. See Section II, supra.

FN112. 496 U.S. 91 (1990).

FN113. Id. at 105.

FN114. 507 U.S. 761 (1993).

FN115. Id. at 767. In Florida Bar v. Went For It, Inc., 115 S. Ct. 2371

(1995), the Court, while upholding a restriction on attorney advertising, expressly disclaimed approval of commercial speech restrictions "motivated primarily by paternalism." Id. at 2379 n.2.

FN116. 447 U.S. 557 (1980).

FN117. The Court found that in view of "our country's dependence on energy resources beyond our control, no one can doubt the importance of energy conservation. Plainly, therefore, the state interest asserted is substantial." 447 U.S. at 568. The Court also accepted as a "substantial interest" the state's interest in having fair and efficient rates, but found that the ban did not directly advance that interest. Id. at 568-69.

FN118. Id. at 569.

FN119. Id. at 570.

FN120. See Section III.B(1)(a), supra.

FN121. See Section III.B(1)(a), supra.

FN122. 447 U.S. at 563.

FN123. Id. at 564.

FN124. Id.

FN125. Id.

FN126. In Discovery Network, the Court did not purport to add a separate element to the Central Hudson test, although its reasoning could properly have supported such an addition. Instead, the Court found that the city had failed to meet the "reasonable fit" requirement of Central Hudson, because "(t)he city has asserted an interest in aesthetics, but respondent publishers' newsracks are no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks." 507 U.S. at 425. The restriction on commercial newsracks was therefore not narrowly tailored.

FN127. Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328 (1986). See Section III.A(1)(b), supra.

FN128. Posadas, 478 U.S. at 331-36.

FN129. Id. at 341-42.

FN130. Id. at 342.

FN131. Justice Brennan, dissenting in Posadas, saw "no reason why commercial speech should be afforded less protection than other types of speech where, as here, the government seeks to suppress commercial speech in order to deprive consumers of accurate information concerning lawful activity." 478 U.S. at 350.

FN132. See note 16, supra, and accompanying text.

FN133. Kozinski & Banner, supra note 28, at 649 (footnote omitted).

FN134. Posadas, 478 U.S. at 345-46. See Section III.A(1)(b), supra.

FN135. The Court, it should be recalled, has expressly left this question open. See Section III.A(1)(b), supra.

FN136. 113 S. Ct. 2696 (1993).

FN137. Id. at 2704.

FN138. "Instead of favoring either the lottery or the nonlottery State, Congress opted to support the anti-gambling policy of a State . . . by forbidding stations in such a State from airing lottery advertising. At the same time it sought not to unduly interfere with the policy of a lottery sponsoring State. . .." Id. at 2704.

FN139. A relatively recent lower court decision in this line is 44 Liquormart, Inc. v. Rhode Island, 39 F.3d 5 (1st Cir. 1994), cert. granted, 115 S. Ct. 1821 (1995). There the court upheld a state law forbidding advertising the price of liquor except at the place of sale if sold within the state. The parties had stipulated that the state had a substantial interest in regulating the sale of alcoholic beverages. The court found that the price advertising ban directly advanced the state's interest. Id. at 7. See also Dunagin v. City of Oxford, 718 F.2d 738 (5th Cir. 1983) (en banc), cert. denied, 467 U.S. 1259 (1984); Queensgate Investment Co. v. Liquor Control Comm'n, 69 Ohio St. 2d 361, 433 N.E.2d 138 (1982).

As this Article went to press, the Supreme Court decided 44 Liquormart, Inc. v. Rhode Island, 1996 WL 241709 (U.S. May 13, 1996). The Court there unanimously reversed the First Circuit, holding the state ban on

liquor price advertising unconstitutional. Justice Stevens, announcing the judgment, and concurring Justice O'Connor, speaking for four Justices, found that the ban failed the Central Hudson test. Justice Stevens noted: "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." Id. at *11. Though four separate opinions were written, the decision is likely to increase significantly the level of constitutional protection for tobacco advertising. As Justice Thomas wrote concurring in the judgment, both Justice O'Connor's and Justice Stevens' opinions indicate that "the Court's holding will in fact be quite sweeping if applied consistently in future cases." Id. at *22 (Thomas, J., concurring in the judgment).

FN140. 115 S. Ct. 1585 (1995). But see 44 Liquormart, Inc. v. Rhode Island, 1996 WL 241709 (U.S. May 13, 1996).

FN141. 27 U.S.C. S 205(e)(2) (1994).

FN142. 115 S. Ct. at 1588.

FN143. Id. at 1591.

FN144. See Section III.A (2), supra.

FN145. See 115 S. Ct. at 1593-94; Section III.B(2), infra.

FN146. See Section II, supra.

FN147. In Coors, Justice Stevens, the author of the Court's opinion in Discovery Network, concurred separately in the judgment, suggesting that "the Court should ask whether the justification for allowing more regulation of commercial speech than other speech has any application to this unusual statute." 115 S. Ct. at 1594 (Stevens, J., concurring in the judgment). In this sense, he was consistently applying his Discovery Network insight. However, because both Justice Stevens and the majority agreed on the ultimate outcome, Coors does not provide a true test of the Discovery Network holding.

FN148. See, e.g., Linmark Assoc., Inc. v. Willingboro, 431 U.S. 85 (1977); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). See also Section III.B(1)(a), supra.

FN149. See Section III.B(1)(b), supra.

FN150. See note 126, supra, and accompanying text.

FN151. Edenfield v. Fane, 507 U.S. 761, 776 (1993).

FN152. Id. at 774 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989)). See also Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2376 (1995) (quoting Edenfield). For an example of such close review in the lower courts, see Citizens United for Free Speech v. Long Beach Township Bd. of Comm'rs, 802 F. Supp. 1223 (D. N.J. 1992) (invalidating an ordinance placing restrictions on real estate signs that had been justified on the grounds that it ensured traffic safety, improved aesthetics and preserved property values.).

FN153. It is true that the Court in Central Hudson itself appeared to assume a connection between promotional advertising and use of electricity, albeit in dictum. 447 U.S. at 570-71. Further, in Posadas, it should be recalled, the Court expressly refused to question the Puerto Rican Legislature's assumption of a connection between promotional advertising and the activity of gambling. 478 U.S. at 344. See Section III.B(1)(b), supra. However, in neither of these cases was brand

competition even a conceivable a factor. The same is not true of Coors. See 115 S. Ct. at 1592. But there the Court was considering exclusively the advertising of alcoholic strength, rather than the use of promotional advertising. In any event, its discussion was dictum, since the Court ultimately overturned the challenged law.

FN154. See, e.g., Tobacco Issues: Hearings on H.R. 1250 Before the Subcomm. on Transportation and Hazardous Materials of the Comm. on Energy and Commerce of the House of Representatives, 101st Cong., 1st Sess. 535-41, 536 (1990) (statement of the Smokeless Tobacco Council, Inc.)("(T)obacco is a . mature' product market in which advertising promotes brand loyalty and brand selection among those consumers who already have exercised their freedom of choice to use tobacco products.").

FN155. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 648 (1985). There the Court found that "nowhere does the State cite any authority or evidence of any kind." Id.

FN156. Edenfield, 507 U.S. at 771.

FN157. 39 F.3d 5 (1st Cir. 1994), cert. granted, 115 S. Ct. 1821 (1995). As this Article went to press, the Supreme Court reversed the First Circuit decision. See note 139, supra. Justice Stevens, announcing the judgment of the Court, stated: "(A)ny conclusion that elimination of the ban would significantly increase alcohol consumption would require us to engage in the sort of 'speculation or conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest." 1996 WL 241709, at *13 (quoting Edenfield, 507 U.S. at 770). "Such speculation," Justice Stevens added, "certainly does not suffice when the State takes aim at accurate commercial information for paternalistic ends." Id.

FN158. Id. at 7.

FN159. Id.

FN160. See id.

FN161. Id.

FN162. 39 F.3d. at 7. See also Dunagin v. City of Oxford, 718 F.2d 738 (5th Cir. 1983) (en banc), cert. denied, 467 U.S. 1259 (1984);

Queensgate Investment Co. v. Liquor Control Comm'n, 69 Ohio St. 2d 361, 433 N.E. 2d 138 (1982). However, both decisions, unlike 44 Liquormart, were decided prior to Edenfield.

A post-Edenfield decision is Anheuser-Busch, Inc. v. Mayor and City Council of Baltimore City, 855 F. Supp. 811 (D. Md. 1994), in which the court upheld an ordinance banning billboard advertising of alcoholic beverages. The court was "unable to find any language in Edenfield that specified the precise level of scrutiny with which this Court must review the ordinance." Id. at 815. The court further found that "(t)he handful of lower courts that have considered the impact of the recent Supreme Court decisions involving commercial speech on Central Hudson have recognized a legislative judgment that advertising increases consumption." Id. at 816.

FN163. Miller, supra note 59, at 639 (footnote omitted). The same commentator expresses the fear that "(a) single expert's view, if adopted by the court, could effectively reverse the judgment of an entire legislature." Id. (footnote omitted). However, given that First Amendment rights are implicated, it seems entirely appropriate for the countermajoritarian judiciary to exercise such power, if circumstances warrant.

FN164. Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995).

FN165. Id. at 1593.

FN166. Id. The Coors Court rejected the argument

that respondent's litigation positions can be used against it as proof that the Government's regulation is necessary. That respondent wishes to disseminate factual information concerning alcohol content does not demonstrate that it intends to compete on the basis of alcohol content. Brewers may have many different reasons--only one of which might be a desire to wage a strength war--why they wish to disclose the potency of their beverages.

Id.

FN167. The deference given by the 44 Liquormart court is in any event distinguishable from the tobacco advertising situation (although not from Coors), because of the unique relevance of the Twenty-First Amendment to a state's power to regulate the sale of alcoholic beverages, even in the face of a First Amendment challenge. See 39 F.3d at 8: "(T)he presumption based upon the Twenty-First Amendment . . . seems

precisely in order." See also California v. LaRue, 409 U.S. 109, 118-19 (1972), where the Court spoke of "the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires."

FN168. In Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981), the Court upheld the city's ban on off-site billboard advertising under the Central Hudson test. Although the record failed to establish a connection between billboards and traffic safety, the Court nevertheless "hesitate(d) to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that these judgments are unreasonable." Id. at 509. However, the regulation there was not content- based, as is a tobacco advertising ban. In any event, Metromedia long predates the much more sweeping judicial inquiries adopted in Edenfield and Coors.

FN169. 447 U.S. at 565.

FN170. According to one commentator, "(t)he rigor of the alternatives inquiry a court undertakes pursuant to Central Hudson . . . seems to be

shaped predominantly by that court's receptiveness or hostility to the advertising ban at issue." Miller, supra note 59, at 640.

FN171. See Bd. of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 476-77 (1989):

Our cases have repeatedly stated that government restrictions upon commercial speech may be no more broad or no more expansive than "necessary" to serve its substantial interests. . . . If the word "necessary" is interpreted strictly, these statements would translate into the "least-restrictive-means" test. . . . Whatever the conflicting tenor of our prior dicta may be, we now focus upon this specific issue for the first time, and conclude that the reason of the matter requires something short of a least-restrictive-means standard. The Court nevertheless emphasized, however, that the level of review under Central Hudson is considerably more intense than under the deferential "reasonableness" standard of substantive due process review. Id. at 480.

FN172. Coors, 115 S. Ct. at 1593-94.

FN173. Discovery Network, 507 U.S. at 425. See also 44 Liquormart, Inc. v. Rhode Island, 1996 WL 241709 (U.S. May 13, 1996).

FN174. Posadas, 478 U.S. at 344.

FN175. See Section III.B(1)(b), supra.

FN176. Government could seek to justify either a total or partial ban on tobacco advertising on the grounds that such advertising would be seen by minors. See note 89, supra. There should be little doubt, however, that such a rationale would fail to justify such a ban under the "reasonable fit" requirement of Central Hudson, because the ban would "regulate speech that poses no danger to the asserted state interest. . . . " 447 U.S. at 565. See note 90, supra, and accompanying text.

FN177. See Section III.B(2)(a) & (b), supra.

FN178. See Section II, supra.

FN179. See Section III.A(2), supra.

FN180. Even those who believe that commercial speech is deserving of less protection than noncommercial speech because of its lesser value

should be troubled by the application of a tobacco advertising ban to claims concerning the scientific validity of the asserted link between smoking and health. Such claims are appropriately characterized as fully protected scientific speech, rather than commercial speech. See generally Redish, supra note 4.

FN181. In addition, the government has required tobacco advertisers to include warnings about a variety of health risks to which the product is thought to give rise. 15 U.S.C. SS 1331- 34 (1994). While conceivable First Amendment questions may be raised about such requirements, the practice of requiring such warnings has been established.

FN182. If the Court were actually to uphold a complete ban on tobacco advertising, arguably these lesser measures would automatically be deemed constitutional. But see infra note 189 and accompanying text; Section III.A, supra. The following analysis therefore proceeds on the assumption that, as argued here, a complete ban would be held to violate the First Amendment.

FN183. Imposition of such limitations was proposed in the never-enacted Protect Our Children From Cigarettes Act of 1989, H.R. 1250, 101st

Cong., 1st Sess. (1989). That act would have restricted tobacco advertising that "is or may be seen or heard by any person under the age of 18" to promotions that do "not contain any human figure or facsimile thereof; any brand name logo or symbol, or any picture other than a picture of a single package of the tobacco product being advertised displayed against a neutral background," and required that "the print in the advertisement (be) on a white background and the type size and the type face in the advertisement is the same as the type size and type face in the warning in the advertisement required by section 4 of the Federal Cigarette Labeling and Advertising Act. . . . " Restrictions also were to be placed on the display of a package contained in an advertisement. Id. H.R. 1250, S 3(a).

FN184. This form of limitation is included in President Clinton's recently proposed regulations. See note 89, supra.

FN185. 403 U.S. 15 (1971).

FN186. 491 U.S. 397 (1989).

FN187. Cohen, 403 U.S. at 26.

FN188. The leading advocate of this position has been Professor C. Edwin Baker. See generally C. Edwin Baker, Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech, 130 U. Pa. L. Rev. 646 (1982); C. Edwin Baker, Commercial Speech: A Problem in the Theory of Freedom, 62 Iowa L. Rev. 1 (1976). But see Pacific Gas and Elec. Co. v. Public Utilities Comm'n, 475 U.S. 1 (1986); Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980); First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (all recognizing corporate First Amendment rights).

FN189. Whether tombstone limitations would be upheld under the Central Hudson test is likely to turn on an analysis similar to that employed for the total ban. See Section III.B(2), supra. The only conceivable difference is that tombstone limitations arguably fare better under the "reasonable fit" requirement, since they allow at least some advertising. However, if the argument made here is accepted, tombstone limitations should be deemed at least as pernicious to First Amendment values as a total ban.

FN190. See, e.g., New York v. Ferber, 458 U.S. 747 (1982); Ginsberg v. New York, 390 U.S. 629 (1968).

FN191. See, e.g., John Harrington, Up In Smoke: The FTC's Refusal to Apply the "Unfairness Doctrine" to Camel Cigarette Advertising, 47 Fed. Comm. L.J. 593, 594 (1995) (footnote omitted) (referring to "disturbing evidence suggesting that children may be attracted to smoking by the cartoon imagery and the debonair demeanor of Old Joe."). But see note 196, infra.

FN192. See Section IV.A, supra.

One commentator recently argued that "Joe Camel" does not deserve First Amendment protection, because "(t)he First Amendment specifically protects speech. It does not specifically protect nonverbal expression." Lee Reed, Should the First Amendment Protect Joe Camel? Toward an Understanding of Constitutional "Expression," 32 Am. Bus. L.J. 311, 312 (1995). Such a grudging approach to the scope of the First Amendment is inconsistent with established Supreme Court doctrine, the values widely thought to be fostered by the free speech protection, and the traditionally flexible approach used to interpret constitutional text. The same commentator argues that "the (Joe Camel) image does not seem to convey a particularized message. It produces only an emotional response. In a significant sense it conveys no message at all. . . . Joe

Camel no more asserts a particularized message than does a piece of instrumental music." Id. at 349. But there can be little question that "a piece of instrumental music" could, in fact, receive First Amendment protection against content-based governmental regulation.

FN193. See, e.g., Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 68 (1983); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980); First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).

FN194. See Section V.A, infra.

FN195. Classic illustrations include Planters' "Mr. Peanut" character, the use of the Peanuts comic strip characters to advertise Metropolitan Life Insurance, Seven-Up's use of animated spots, the Illinois Lottery's "Little Wizard," and-- for those old enough to recall it--"Speedy Alkaseltzer." Moreover, a regular cartoon show may have its predominant appeal to adults, as "The Simpsons" illustrates.

FN196. It might be argued that while "Joe Camel" is not designed to appeal to younger children, it does have a special appeal to teenaged minors. Cf. John P. Pierce et al., Does Tobacco Advertising Target Young

People to Start Smoking? Evidence From California, 266 JAMA 3154 (1991) (concluding that the perception of cigarette advertising is higher among young smokers). But even if true, this conclusion would not necessarily imply that the advertising campaign had actually targeted minors. Appeals aimed primarily at young adults may conceivably have simultaneous appeal to certain teenagers. But as has already been shown, see note 90, supra, under well established Supreme Court holdings, the First Amendment prohibits imposition of restrictions on expression on the grounds that children may simultaneously be exposed to them. The one possible exception to this principle is confined to the unique situation of broadcasting. See Section V.A, infra.

FN197. Presumably, in light of the First Amendment interests that are implicated by the regulation of commercial speech, the burden of proof on these issues should be imposed on the government.

FN198. See note 90, supra and accompanying text.

FN199. See Section II, supra.

FN200. In this context, it should be noted that the cases in which the

Court originally fashioned the principle in question involved the regulation of indecent, sexually-oriented speech. See cases cited in note 90, supra.

FN201. See Section III.B(1), supra.

FN202. See Section III.B(2), supra.

FN203. Even one commentator who believes that a ban on "Joe Camel" would be constitutional concedes that the "directly advances" requirement "would appear to pose some difficulty for a ban on Joe Camel advertising, since studies have yet to establish any direct causal link between advertising and an increase in cigarette consumption, nor has Joe Camel been conclusively shown to have the effect of causing children to smoke." Harrington, supra note 191, at 608.

One study did purport to show that in questioning of preschool age children, "Old Joe . . . had the highest recognition rate among the tested cigarette logos" and that 91.3% of six-year-old children correctly matched Joe with a picture of a cigarette. Paul M. Fischer et al., Brand Logo Recognition by Children Aged 3 to 6 Years: Mickey Mouse and Old Joe the Camel, 266 JAMA 3145, 3146-47 (1991). However, even if assumed to be accurate, this result in no way establishes either that use of Joe Camel increases smoking among minors or that the campaign is directed

primarily towards minors. Logo recognition is, of course, not the same thing as use. Moreover, the study also found that "there is high recognition of the Chevrolet and Ford logos" among the same children, id. at 3147, though obviously automobile advertising is not primarily directed towards minors.

FN204. See, e.g., Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995); Edenfield v. Fane, 507 U.S. 761 (1993).

FN205. Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989).

FN206. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969).

FN207. Id; see also Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445, 2469 (1994), (applying only an intermediate level of scrutiny to regulations requiring cable operators to set aside channels for designated broadcast signals); cf. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 115 S. Ct. 2338, 2348-49 (1995)(distinguishing parades from cable broadcasting, as parades convey one message-although comprised of individual presentation- while a cable system is "merely 'a conduit' for the speech of participants...'rather than

itself a speaker.'").

FN208. FCC v. Pacifica Found., 438 U.S. 726, 749-50 (1978). In Pacifica, the Court, in upholding the Commission's prohibition on the use of indecent language on an afternoon radio broadcast, reasoned:

(T)he broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. . . . Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. . . .

Second, broadcasting is uniquely accessible to children, even those too young to read. . . . The ease with which children may obtain access to broadcast material . . . amply justif(ies) special treatment of indecent broadcasting.

Id. at 749-50.

FN209. Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D. D.C.) (three-judge court), aff'd sub.

nom. Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1971).

FN210. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

FN211. To the extent that the government's asserted "substantial interest" is characterized exclusively as preserving public health, rather than preserving public health by means of censorship derived from a premise of mistrust of the public, it is clear that a reviewing court would find the "substantial interest" prong of the Central Hudson test satisfied. See Section III.B(2), supra.

FN212. As to whether a complete ban would be found to directly advance the governmental interest, see Section III.B(2), supra. Perhaps an argument could be fashioned that a broadcast ban is more suspect because the government will have left much of the supposed problem unresolved. Cf. Discovery Network, 507 U.S. at 424-26 (finding city's interest in aesthetics cannot justify prohibition of commercial newsracks, because permitted noncommercial newsracks give rise to same problem).

However, on other occasions the Court has stated the government need not solve all problems in order to solve some of them. See e.g., United States v. Edge Broadcasting Co., 113 S. Ct. 2696, 2707(1993) (stating government need not "make progress on every front before it can make progress on any front.").

FN213. See note 208, supra.

FN214. In Pacifica, the Court "emphasize(d) the narrowness of (its) holding. . . . The Commission's decision rested entirely on a nuisance rationale under which context is all- important. . . . The time of day was emphasized by the Commission." 438 U.S. at 750. Thus, the Court did not uphold a complete broadcast ban in the interests of protecting children.

FN215. The Court first relied on this scarcity rationale in 1969 in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). Subsequent technological developments include the development of ultrahigh frequency, the expanded use of the FM radio band, and the advent of cable.

FN216. Compare Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (requiring, under the Fairness Doctrine, that broadcast

licensees provide access to competing views on public issues, held to be consistent with First Amendment), with Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (holding legislatively required right of access to print media violates First Amendment).

FN217. See the earlier portions of the Section.

FN218. Neil A. Lewis, Philip Morris Agrees to Keep Ads at Ball Parks Off TV, N.Y. Times, June 7, 1995, at D3, col. 3.

FN219. Id. Although the settlement by its terms affected only Philip Morris, Justice Department officials indicated that "they expected it to prod other tobacco companies to remove their ads from camera range." Id.

FN220. But see Section V, supra.

FN221. It should be noted that wholly apart from First Amendment considerations, there would exist an issue of statutory interpretation as to whether or not a legislative ban on tobacco advertising broadcasting was

intended to include the telecast of an advertisement included in the substance of a regular program.

FN222. Lewis, supra note 218.

FN223. It should be noted that pursuant to the legislative ban, the government may prohibit only the televising of the stadium advertisements. The ban could not be legitimately construed to prohibit the actual in-stadium display of the advertisements.

FN224. That suppression of one side of a public debate is, in fact, a partial goal of tobacco advertising regulation is illustrated by the congressional "finding," contained in H.R. 1250, 101st Cong., 1st Sess. (1989), that "sales promotion of tobacco products undermines the credibility of government and private health education campaigns against smoking. . . . " S 2, & 19.

FN225. The fact that a ban on a particular course of conduct does not violate the First Amendment right of free expression, of course, does not necessarily imply that it is free of all constitutional difficulties.

FN226. See generally Meiklejohn, supra note 65.

FN227. For a detailed analysis of this "self-realization" value of free expression, see Martin H. Redish, The Value of Free Speech, 130 U. Pa. L. Rev. 591 (1982).

FN228. See generally Frank I. Michelman, Law's Republic, 97 Yale L.J. 1493 (1988) (rationalizing right to privacy on civic republican ground of need for effective citizen participation in government).

FN229. See Sections II, III.A(2), supra.

FN230. See, e.g., Buckley v. Valeo, 424 U.S. 1 (1976) (holding limits on campaign spending by candidates unconstitutional).

FN231. See Redish, supra note 45, at 110-11.

FN232. 507 U.S. 410 (1993). See Section II, supra.

FN233. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980). See Section III.B(2), supra.

FN234. See, e.g., Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995); Edenfield v. Fane, 507 U.S. 761 (1993). See Section III.B(2)(b), supra.

FN235. See Section III.B(2), supra.

FN236. See Section IV.B, supra.

FN237. The Supreme Court has long held that speech directed towards adults may not be suppressed out of the concern that it might be seen by children. See note 90, supra.

FN238. See note 195, supra, and accompanying text.

FN239. See Section IV.A, supra.

FN240. See Section IV.A, supra.

FN241. See Section V.A, supra.

FN242. See id.

FN243. See FCC v. Pacifica Found., 438 U.S. 726 (1978); Section V.A, supra.

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N. Kentucky Law Review Footnotes:

FNa. Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern University. Professor Redish has served as consultant on constitutional issues to the tobacco industry. However, the views expressed in this article are solely those of the author.

FN1. Martin H. Redish, The First Amendment in the Marketplace's Commercial Speech and the Values of Free Expression, 39 Geo. Wash. L. Rev. 429 (1971).

FN2. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). The Court had summarily rejected any First Amendment protection for commercial speech in Valentine v. Chrestensen, 316 U.S. 52 (1942). The Court had laid the groundwork for the extension of First Amendment protection to commercial speech one year earlier in Bigelow v. Virginia, 421 U.S. 809 (1975). However, the

case concerned limitations on the advertising of abortion services, and therefore implicated the district constitutional right of privacy. See also Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

FN3. Prior to that point, few commentators had considered the issue of the constitutional protection to be afforded commercial speech, and those that had done so in a most summary and conclusory manner. See Thomas Emerson, Toward aGeneral Theory of the First Amendment 105 n.46 (1966) (asserting that "(c)ommunications in connection with commercial transactions generally relate to a separate sector of social activity involving the system of property rights rather than free expression.").

FN4. Redish, supra note 1, at 444, 472. "By providing the consuming public with

information, commercial speech aids in the attainment of society's goal of intellectual self-fulfillment and, more importantly, helps the individual to rationally plan his life to achieve the maximum satisfaction possible within the reach of his resources. In so doing it serves an important function as a catalyst in the achievement of personal self-realization." Id. at 472.

FN5. See, e.g., C. Edwin Baker, Realizing Self-Realization: Corporate Political Expenditures and Redish's "The Value of Free Speech", 130 U. Pa. L. Rev. 646 (1982).

FN6. See, e.g., City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993); Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995); 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996); Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

FN7. See, e.g., Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (allowing regulation of commercial speech where damage "may" occur or that harm is "likely"); Friedman v. Rogers, 440 U.S. 1, 13 (1979) (allowing regulation of commercial speech when there exists a "possibility" of harm).

FN8. As to the minimal level of constitutional protection provided by economic substantive due process, see, e.g., Ferguson v. Skrupa, 372 U.S. 726 (1963).

FN9. See Martin H. Redish, Freedom of Expression: A Critical Analysis

60-68 (1984).

FN10. 507 U.S. 410 (1993).

FN11. Id. at 424 (rejecting city's argument that it could prohibit commercial newsracks, even though other newsracks present same aesthetic problem, because commercial speech is less worthy of protection).

FN12. See supra note 2.

FN13. 116 S. Ct. 1495 (1996).

FN14. Justice Stevens announced the judgment of the Court. On the relevant portions of his opinion, he spoke for two other members of the Court as well. Justice Thomas, concurring separately, argued that truthful commercial speech could no more be regulated than could noncommercial speech. Justice Scalia also concurred separately. Justice O'Connor, speaking for three members of the Court, agreed that the Rhode Island laws were unconstitutional, but did so solely on the basis of existing standards of commercial speech protection. See discussion infra

text at notes 47-67.

FN15. See supra note 14.

FN16. See 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1504 (1996) (Stevens, J.). See discussion infra text at notes 47-50.

FN17. See Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) (extending full First Amendment protection to an article in Consumer Reports about merits of stereo speakers alleged to be defamatory).

FN18. See discussion infra text at notes 72-117.

FN19. In previous writing, I have argued that while obscenity regulation has been justified by the Supreme Court on the grounds that it fails to contribute to the marketplace of ideas, in reality it represents governmental condemnation of the lifestyle embodied in obscenity. Redish, supra note 9, at 69-70.

FN20. See discussion infra text at notes 84-117.

FN21. See discussion infra text at notes 84-106.

FN22. Cf. R. A. V. v. City of St. Paul, 505 U.S. 377 (1992) (racist speech constitutionally protected).

FN23. See discussion infra text at notes 107-117.

FN24. While it is true that speech aimed at minors does not receive full First Amendment protection (see, e.g., Ginsberg v. New York, 390 U.S. 629 (1968)), regulations recently imposed by the Food and Drug Administration on tobacco advertising extend well beyond the limited context of minors. It is well established that expression aimed at adults cannot be regulated on the grounds that it is also seen or heard by minors. See, e.g., Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 131 (1989) (restricting phone-sex services held unconstitutional because the statute "has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear."); Butler v. Michigan, 352 U.S. 380, 383 (1957) (statute

making it an offense to make available to the general public materials found to have potentially harmful influence on minors held unconstitutional because statute is "not reasonably restricted to the evil with which it is said to deal.").

FN25. For a more detailed discussion of this point, see Martin H. Redish, Tobacco Advertising and the First Amendment, 81 Iowa L. Rev. 589, 604-07 (1996).

FN26. Even the opinions in 44 Liquormart that urged an extension of full First Amendment protection to truthful commercial speech accepted that false advertising could be regulated. See discussion infra, text at notes 57-59.

FN27. See supra Part II.B.

FN28. See supra Part III.

FN29. See supra Part IV.

FN30. See supra Part IV.

FN31. 425 U.S. 748 (1976).

FN32. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

FN33. See, e.g., id. at 457 (upholding commercial speech regulation when it has been demonstrated only that damage "may" occur); id. at 464 (mere likelihood of harm sufficient to justify regulation); Friedman v. Rogers, 440 U.S. 1, 13 (1979) (upholding regulation of commercial speech where there is a "possibility" of harm).

FN34. 447 U.S. 557 (1980).

FN35. Id. at 563-64.

FN36. See, e.g., United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (describing level of governmental interest required to regulate substance of protected expression as "compelling", "substantial", "subordinating", "paramount", "cogent" and "strong"). See also Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (upholding

regulation of advocacy of unlawful conduct only when "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

FN37. It should be emphasized that while the Central Hudson test has undoubtedly

failed to provide a level of constitutional protection equal to that affords non-commercial speech, its protection is nevertheless considerably more than insignificant. See, e.g., Edenfield v. Fare, 507 U.S. 761 (1993) (state interest must be served in direct and effective way); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 648 (1985) (requiring more than "tenuous" supporting evidence); Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995) (pointing to government's failure to point to credible supporting evidence).

FN38. Central Hudson, 447 U.S. at 569-70 (noting that ban on electric utility's promotional advertising directly advanced the state's substantial interest in reducing electricity consumption).

FN39. 478 U.S. 328 (1986).

FN40. See Martin H. Redish, Product Health Claims and the First

Amendment: Scientific Expression and the Twilight Zone of Commercial Speech, 43 Vand. L. Rev. 1433, 1441-42 (1990) (arguing that Posadas "actually has reversed the ' greater' and the 'lesser.' (The) logic effectively reduces the greater first amendment protection of expression to the considerably lesser fifth amendment protection afforded commercial conduct.").

FN41. See 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1512 (1996).

FN42. Posadas, 478 U.S. at 345-46.

FN43. See Central Hudson, 447 U.S. at 566; see discussion supra text at notes 34-38.

FN44. See, e.g., Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995); City of Cincinnati v. Discovery Network, 507 U.S. 410 (1993); Edenfield v. Fare, 507 U.S. 761 (1993); Peel v. Attorney Registration and Disciplinary Comm'n, 496 U.S. 91 (1990). See discussion supra text at notes 10-12.

FN45. See the opinions of Justice Stevens, speaking for three Justices, and of Justice Thomas. 44 Liquormart, 116 S. Ct. at 1495, 1515. See

discussion infra text at notes 47-67.

FN46. Recall the exceptions recognized in 44 Liquormart for regulations of both false

advertising and harassing commercial speech. See supra note 26; see discussion infra text at notes 57-59.

FN47. 44 Liquormart, 116 S. Ct. at 1504.

FN48. Id. at 1506.

FN49. Id. at 1507.

FN50. Id. at 1512.

FN51. Id. at 1507-08.

FN52. Id.

FN53. Id. at 1507.

FN54. See, e.g., Brandenburg v. Ohio, 395 U.S. 444 (1969) (allowing

regulation of unlawful advocacy only when imminent danger exists).

FN55. See, e.g., Brandenburg, 395 U.S. at 444; United States v. O'Brien, 391 U.S. 367 (1968); Barrenblatt v. United States, 360 U.S. 109 (1959); Dennis v. United States, 341 U.S. 494 (1951).

FN56. See, e.g., NAACP v. Button, 371 U.S. 415, 438 (1963) ("compelling" interest required to justify speech regulation); John Hart Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482 (1975).

FN57. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (holding that defamations of public officials are unprotected by the First Amendment when made either with knowledge of falsity or reckless disregard of truth or falsity).

FN58. See, e.g., Gregory v. City of Chicago, 394 U.S. 111 (1969).

FN59. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1507 (1996).

FN60. Id. at 1515 (Thomas, J., concurring).

FN61. Id. at 1516 (Thomas, J., concurring).

FN62. Id. at 1517 (Thomas, J., concurring).

FN63. Justice Scalia, concurring separately, initially inquired what history would say about the issue, and found no evidence. He therefore believed the issue should be resolved under current doctrinal standards, and agreed that the Rhode Island laws were unconstitutional when measured under those standards. 44 Liquormart, 116 S. Ct. at 1515 (Scalia, J., concurring).

FN64. Chief Justice Rehnquist, and Justices Souter and Breyer concurred in Justice O'Connor's opinion. 44 Liquormart, 116 S. Ct. at 1520.

FN65. Id. at 1521 (O'Connor, J., concurring).

FN66. See discussion supra text at notes 47-59.

FN67. 44 Liquormart, 116 S. Ct. at 1516.

FN68. See discussion supra text at notes 13-16.

FN69. See Breard v. City of Alexandria, 341 U.S. 627 (1951); Valentine v. Chrestensen, 316 U.S. 52 (1942).

FN70. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

FN71. See Redish, supra note 1.

FN72. See discussion supra text at notes 2-3.

FN73. Redish, supra note 1, at 434-41.

FN74. See discussion infra text at notes 31-46.

FN75. See Thomas Jackson & John Jeffries, Commercial Speech: Economic Due Process and the First Amendment, 65 Va. L. Rev. 1 (1979) (arguing that subject of commercial speech is, as a general matter, beneath First Amendment concerns).

FN76. See, e.g., Robert Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971).

FN77. See Jackson & Jeffries, supra note 75, at 7-8:

The first amendment guarantee of freedom of speech and press protects only certain identifiable values. Chief among them is effective self-government. Additionally, the first amendment may protect the opportunity for individual self-fulfillment through free expression. Neither value is implicated by governmental regulation of commercial speech.

FN78. See id. at 14 ("Whatever else it may mean, the concept of a first amendment right of personal autonomy in matters of first amendment right of personal autonomy in matters of belief and expression stops short of a seller hawking his wares.").

FN79. See Redish, supra note 1, at 443-48. See also Martin H. Redish, The Value of Free Speech, 130 U. Pa. L. Rev. 591, 630 (1982).

FN80. Redish, supra note 1, at 443-48.

FN81. Virginia State Board of Pharmacy v. Virginia Citizens Consumer

Council, Inc., 425 U.S. 748, 762 (1976). See also Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983). After Bolger, according to Professor Shiffrin, the Court "seems to equate commercial speech and commercial advertising . . . ." Stephen Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. U. L. Rev. 1212, 1222 n.70 (1983).

FN82. There exists substantial confusion in Supreme Court doctrine as to the extent to which corporate speech must directly propose a commercial transaction in order to qualify as "commercial speech." See Redish, supra note 40, at 1448- 53.

FN83. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984). See discussion supra text at notes 72-82.

FN84. Virginia Board, 425 U.S. at 772 n.24.

FN85. Id.

FN86. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1507-08 (1996).

FN87. 376 U.S. 254 (1964).

FN88. Id. at 278-79.

FN89. Id. at 256.

FN90. See Redish, supra note 1, at 448-58.

FN91. See, e.g., United States v. O'Brien, 391 U.S. 367 (1968).

FN92. See, e.g., Friedman v. Rogers, 440 U.S. 1, 10 n.9 (1979).

FN93. See Daniel A. Farber, Commercial Speech and First Amendment Theory, 74 Nw. U. L. Rev. 372 (1979).

FN94. Even at the point of sale, it should be noted, the speech promoting the sale is arguably still sufficiently distinct from the actual sale as to remain fully protected speech.

FN95. For many years, the Supreme Court has protected advocacy of unlawful conduct. See, e.g.,

Brandeburg v. Ohio, 395 U.S. 444 (1969); Hess v. Indiana, 414 U.S. 105 (1973); Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974).

FN96. To the extent the speaker is not a corporation, of course, this rationale is inapplicable.

FN97. In particular, see Baker, supra note 5.

FN98. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68 (1983). See also Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1 (1986) (corporation has First Amendment right not to be required to mail newsletter with utility bill); First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (corporation's political expression fully protected under First Amendment).

FN99. See Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) (statute prohibiting corporations from making expenditures from their general treasuries held constitutional).

FN100. See Redish, supra note 40, at 1448-53.

FN101. The combination of the Court's case of the commercial speech distinction and its full protection of noncommercial corporate speech, not surprisingly, leads to a good deal of doctrinal confusion. See supra note 82.

FN102. See Baker, supra note 5.

FN103. See, e.g., Alexander Meiklejohn, Political Freedom; the constitutional powers of the people (1960).

FN104. The issue is discussed in detail in an as yet unpublished manuscript, Martin H. Redish & Howard Wasserman, What's Good for General Motors: Corporate Speech and the Theory of Free Expression (unpublished manuscript, on file with author).

FN105. Ironically, one of the arguments often relied upon in opposition to

corporate speech protection is peculiarly inapplicable to corporate speech. That argument is that minority shareholders may be forced to accept corporate political expression with which they do not agree. See Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 663 (1990). Presumably, such concerns are likely to be irrelevant to expression advertising the corporation's commercial product or service.

FN106. See, e.g., Cass Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539 (1988); Richard Fallon, What Is Republicanism, and Is It Worth Reviving?, 102 Harv. L. Rev. 1695 (1989).

107 FN107. See generally Martin H. Redish & Gary Lippman, Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications, 79 Cal. L. Rev. 267 (1991).

FN108. See generally Martin H. Redish, Freedom of Thought as Freedom of Expression: Hate Crime Sentencing and First Amendment Theory, Criminal Justice Ethics 29 (1992).

FN109. See supra notes 124, 125.

FN110. See generally Jane Mansbridge, Beyond Adversary Democracy (1980).

FN111. Id.

FN112. See discussion supra text at note 124.

FN113. See Lea Brilmayer, The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement, 93 Harv. L. Rev. 297, 302 (1979).

FN114. See Sierra Club v. Morton, 405 U.S. 727 (1972) (ideological plaintiffs lack standing for purposes of Article III).

FN115. See generally Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 835 (1983).

FN116. See Brilmayer, supra note 113.

FN117. See supra note 106.

FN118. See discussion supra text at notes 84-117.

FN119. It should be emphasized that even were the definition of "commercial speech" broadened to include all expression concerning the relative merits of commercial products and services, the arguments against extending full First Amendment protection to such expression are unpersuasive. See Redish, supra note 1; see discussion supra text at note 81.

FN120. See discussion supra text at notes 81-83.

FN121. See discussion supra text at notes 84-105.

FN122. See discussion supra text at notes 106-117.

FN123. See, e.g., Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Police Dep't v. Mosley, 408 U.S. 92 (1972); Schacht v. United States, 398 U.S. 58 (1970). See generally Geoffrey Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189 (1983).

FN124. Herbert Weschsler, Toward Neutral Principles of Constitutional

Law, 73 Harv. L. Rev. 1 (1959).

FN125. See, e.g., Mark Tushnet, Following the Rules Laid Down: A Critique of Interpretation and Neutral Principles, 96 Harv. L. Rev. 781 (1983).

FN126. See, e.g., Richard Delgado, The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?, 22 Harv. C.R.-C.L. L. Rev. 301,

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Rules

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Rights, a special kind of rule, receive particularly harsh criticism from

> Critical Legal Scholars (Crits) Rights legitimatize unfair power arrangements, acting like pressure valves to allow only so much injustice. With much fanfare, the powerful periodically distribute rights as proof that the system is fair and just, and then quietly deny rights through narrow construction, nonenforcement, or delay.
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> . . . .
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> Rights, Crits argue, are never promulgated in genuinely important areas such as economic justice. They protect only ephemeral things, like the right to speak or worship. When even these rights become threatening, they are limited.

FN127. See discussion supra text at notes 72-117.

FN128. Thomas Hobbes, Leviathan (1651).

FN129. See discussion supra text at notes 72-117.

FN130. See Redish, supra note 1.

FN131. See discussion supra Part III.A.

FN132. See generally Martin H. Redish, Tobacco Advertising and the First Amendment, 81 Iowa L. Rev. 589 (1996).

FN133. See supra note 123.

FN134. See Geoffrey Stone, Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U. Chi. L. Rev. 81, 101- 03 (1978).

FN135. I have explored the concept of epistemological humility and its relationship to First Amendment theory in Redish, supra note 40, at 1443-44.

FN136. See discussion supra text at notes 106-117.

FN137. See Vince Blasi & Henry P. Monaghan, The First Amendment and Cigarette Advertising, 256 JAMA 502 (1986).

FN138. Jackson & Jeffries, supra note 75, at 7-8.

FN139. See Blasi & Monaghan, supra note 137.

FN140. See generally Baker, supra note 5.

FN141. While several scholars have raised concerns over the First Amendment implications of government speech (see, e.g., Marte G. Yudoff, When Government Speaks 42 (1983)), it would simply be unworkable to erect a system in which government could not attempt to educate or persuade the public. See Martin H. Redish & Daryl Kessler, Government Subsidies and Free Expression, 80 Minn. L. Rev. 543, 569 (1996).

FN142. To the extent the system of free expression were to respond at all to the possibility of such market failure, it would be exclusively by means of a constitutionally dictated right of access.

FN143. See discussion supra text at notes 47-49.

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